

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DONALD PAPAY,)	CASE NO. 07-civ-3858
Plaintiff,)	
v.)	
)	
VIRGINIA HASELHUHN as ASSISTANT)	
EXECUTIVE DIRECTOR, AMERICAN)	
REGISTRY OF RADIOLOGIC)	
TECHNOLOGISTS, RICHARD F. DAINES as)	
COMMISSIONER, STATE OF NEW YORK)	
DEPARTMENT OF HEALTH, ADELA)	
SALAME-ALFIE as DIRECTOR, STATE OF)	
NEW YORK DEPARTMENT OF)	
HEALTH - - BUREAU OF)	
ENVIRONMENTAL RADIATION)	
PROTECTION (in his official capacity);)	
Defendants.)	

PLAINTIFF'S AFFIRMATION IN OPPOSITION TO
DEFENDANTS', RICHARD F. DAINES, AS COMMISSIONER OF THE NEW
YORK STATE DEPARTMENT OF HEALTH AND ADELA SALAME-ALFIE AS
DIRECTOR OF THE NEW YORK STATE DEPARTMENT OF HEALTH
BUREAU OF ENVIRONMENTAL RADIATION PROTECTION'S RULE 12(b)(6)
MOTION TO DISMISS

I, Donald Papay, affirm under penalty of perjury, state that I have knowledge of the following and state the same is true except for those matters stated "upon information and belief" and as to those matters, I believe them to be true.

1. This is an Affirmation in Opposition to Defendants', Richard F. Daines, as commissioner of the New York State Department of Health and Adela Salame-Alfie as director of the New York State Department of Health Bureau of Environmental Radiation Protection's Rule 12(b)(6) Motion to Dismiss.
2. I took the ARRT exam to become a licensed Radiologist. I was told I failed the exam each time he took it, for a total of 7 times.
3. Each time, I was informed that he failed the exam by one or two points.

4. Upon information and belief, there were 20 additional questions, which should have been counted in determining the final test score. I believe that they were not counted and that my test scores were purposefully skewed because of my prior criminal conviction.
5. I obtained my associates degree while incarcerated, received an early work release program and worked for a hospital ever since. I attended a two year radiology program to be able to pursue my dream of becoming a radiologic technologist.
6. After 3 failed examinations, which I was told that he failed by one or two points each, I was forced to again attend the radiologic technician program for an entire year. I then took the test four more times, over a period of six months. I was again told that I failed each exam by one or two points.
7. I have reached the maximum number of attempts to pass this test. I have no way to pursue my desired profession. I have significant belief that my test results were skewed each time based upon the extra points that were not counted and his strong belief that this in fact took place. I knew the materials well and is confident that he answered correctly. I want to see his exam records pursuant to his rights under FOIL, to determine if they were graded properly.
8. I am not seeking to obtain a radiological license other than by lawful means. Indeed I understand the importance of the Public Health Laws governing certification and licensure and the purpose of their enactment, which is to ensure the health and safety of the public and the competence of practitioners.
9. However, I believe that he has answered the test questions in a rightful manner and is entitled to the license in accordance with the Public Health Law. I have been denied

my right of a fair review of the grading method used in my exams. I was denied due process in being found ineligible to receive the license.

10. I and both my previous and current attorneys, sent numerous FOIL requests for Plaintiffs records. ARRT has made it abundantly clear that they will not release the records; they stated in their letter that the ARRT does not release previous forms of examinations or allow individuals to review previous forms of examinations.

11. ARRT provided conflicting statements regarding test question reusing policies. In one of its reply letters to my request ARRT stated: "The ARRT does not release previous forms of an examination because doing so would compromise the security of the test questions...the ARRT reuses test questions," while on its website it said that the questions are revised every five years and new questions are constantly added to keep the exam up to date.

12. The State defendants assert that they do not have the examination records; it is with ARRT. ARRT states that they are not a State Actor and are not required to abide by the FOIL. I filed this action seeking a remedy to my right to due process and my Fourteenth Amendment rights; the liberty to work in my chosen field, which I am entitled to.

13. Plaintiff's complaint was filed in good faith, contains well-grounded claims of law and fact and should not be dismissed.

WHEREFORE For the reasons cited above, defendants' Rule 12(b)(6) should be denied.

Dated: November 29, 2007

_____/s/_____
DONALD PAPAY

Subscribed and sworn to before me November 29, 2007

_____/s/_____
SHMUEL KLEIN

Notary Public - State of New York